IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.495 OF 2002

The Commissioner of Income-tax
Mumbai City-I, Mumbai .. Appellant.
V/s.
M/s.F.G.P. Limited .. Respondent.

Mr.K.R. Chaudhary i/b. H.D. Rathod for the appellant.

CORAM : R.M. LODHA, &
J.P. DEVADHAR, JJ.

DATED : 23RD AUGUST, 2004.

P.C. :

Heard.

2. In the memo of appeal four substantial questions of law have been proposed, namely :

"i. Whether on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the profit on the sale of fixed assets and rent on flat are eligible and have to be included in computing deduction under Section 32AB of the Income Tax Act, 1961 ?

ii. Whether on the facts and in the circumstances of the case, the Tribunal was right in law in directing the assessing officer to allow commission of Rs.3,42,199/- even though the assessing officer had held that it was paid for other than business consideration, and which finding had been confirmed by the CIT(A) ?

iii. Whether on the facts and in the circumstances of the case the Tribunal was right in deleting the addition of

> Rs.15,74,000/- made by the assessing officer and confirmed by the CIT(A) to the closing stock on account of unutilised Modvat Credit ?
>
> iv. Whether on the facts and in the circumstances of the case the Tribunal was right in law in holding that sales tax of Rs.1,17,88,302/- should not be included in the total turnover for computing deduction under Section 80HHC of the Income Tax Act, 1961 ?"

3. Insofar as question No.(iv) is concerned, the learned counsel for the revenue fairly conceded that the controversy stands concluded by the Division Bench judgment of this Court in the case of Commissioner of Income Tax V/s. Sudarshan Chemicals Industries Limited [245 ITR 769]. The Tribunal's view in this regard cannot be faulted.

4. As regards proposed question No.(iii), the controversy stands concluded by the judgment of the Supreme Court in the case of Commissioner of Income Tax V/s. Indo Nippon Chemicals Co. ltd. [261 ITR 275].

5. As regards question No.(ii) the Tribunal in the impugned order observed thus :

> . "The Second ground of appeal is in regard to disallowance of payment of commission of Rs.3,42,199/- by the CIT(A).

> This disallowance was based on the ground discussed in his order for assessment year 1987-88 in the assessee's own case. This issue for assessment year 1987-88 came up before ITAT in ITA No.7522/Bom/91 and decided in favour of the assessee. Following the above decision, we direct to delete the addition of Rs.3,42,199/-."

. We do not find any infirmity in this connection in the order of the Tribunal.

6. As regards proposed question No.(i), in our view the controversy stands concluded by the judgment of the Supreme Court in the case of Apollo Tyres Limited V/s. Commissioner of Income Tax {255 ITR 273] wherein the Supreme Court observed thus :

> . "A perusal of section 32AB, as it stood at the relevant time, shows that if an assessee has a total income including income chargeable to tax under the head "Profits and gains of business or profession" and if the income from such business is derived from an "eligible business" and if the assessee has out of such income utilised any amount during the previous year for the purchase of new plant or machinery then it is entitled to a set off of a sum equal to 20 per cent. of the profit of such eligible business as computed in the accounts of the assessee which account has been audited in accordance with sub-section (5) of section 32AB.
>
> . The dispute in the present case is in regard to the question whether the assessee's investment in the UTI is business, and if so, is it a business which qualifies to be an "eligible

business" under section 32AB ? In regard to the first aspect, we must note that the Tribunal as a question of fact based on material on record has come to the conclusion that the investment in the UTI by the assessee-company is in the course of its business and its business of manufacture and sale of tyres and sale and purchase of units of the UTI are common in nature and both the businesses are intertwined and interlaced. This finding is accepted by the High Court also. We also find that this business of the assessee-company of buying and selling of units is a business as contemplated under section 32AB of the Act. The question then is: is it an eligible business under the said section ? The term "eligible business" is defined under sub-section (2) of section 32AB. As per that definition, all business of an assessee-company will be an eligible business unless it falls under the type of business enumerated in sub-clauses (a) and (b) of section 32AB(2). It is nobody's case that this business of the assessee-company is one of those businesses which fall under business enumerated in sub-clauses (a) and (b) of sub-section (2) of section 32AB. Therefore, there is no doubt that the business of the assessee-company is an eligible business. The fact that it is shown under a different head of income would not deprive the company of its benefit under section 32AB so long as it is held that the investment in the units of the UTI by the assessee-company is in the course of its "eligible business". Therefore, in our opinion, the dividend income earned by the assessee-company from its investment in the UTI should be included in computing the profits of eligible business under section 32AB of the Act".

7. No substantial question of law arises in this appeal. The appeal is dismissed in limine.

(R.M. LODHA, J.)

(J.P. DEVADHAR, J.)